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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHANCELLOR ROY S. NICKS, *et al.*,
Petitioners,

VS.

DR. WILLIAM CLARK FORD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Did the District Court fail to correctly allocate the burden of proof according to Title VII principles in establishing tenure as an appropriate remedy?

II.

Did the Court below err in failing to apply the "but for" test required by 42 U.S.C. §2000e-5(g) in determining that a judicial grant of tenure to a reinstated probationary faculty member was a proper remedial action in this case?

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vs.

DR. WILLIAM CLARK FORD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Chancellor Roy S. Nicks, et al. respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 23, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals (attached hereto as Appendix A) is reported at 741 F.2d 858 (6th Cir. 1984) (Rehearing denied September 20, 1984). The opinion of the Court of Appeals reviews the District Court's Memorandum and Order dated May 11, 1982 (Appendix C hereto) which is unreported, and the District Court's Order of April 26, 1983 (Appendix B hereto) which is unreported.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on August 23, 1984. Petition for rehearing was denied September 20, 1984 and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 2000e-5(g).

STATEMENT OF THE CASE

This case involves the legality of an order of the United States District Court for the Middle District of Tennessee in a Title VII case, requiring Middle Tennessee State University (MTSU) to reinstate a probationary faculty member *with tenure* absent a finding that but for the alleged retaliatory action tenure would have been obtained. The liability of MTSU is not being contested; only the remedy. At issue is the court's allocation of the burden of proof and its interpretation and application of § 706(g) of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(g).

In August, 1973, Dr. William Clark Ford, a nontenured member of the Department of Business Education at MTSU in Murfreesboro, Tennessee was given a terminal one year annual contract effectively terminating him from his University position.[1] Dr. Ford was first employed for the 1970-71 academic year and taught at MTSU for a total of four years. Tenure at

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[1] A probationary non-tenured faculty member could be terminated without cause or a hearing by notice tendered not later than April 15 of the terminal academic year. Such a faculty member had no property right in continued employment. An award of tenure involved certain rights conferred by state law and Board of Regents policy, including continued employment unless dismissed for cause after a hearing.

the school required, *inter alia*, five successful years of teaching and receipt of a sixth annual contract. Dr. Ford filed suit in the U. S. District Court for the Middie District of Tennessee under Title VII, 42 U.S.C. § 2000e-3(a), alleging that his termination was motivated because he opposed acts by MTSU made unlawful by Title VII.[2]

Following a two-day trial in January of 1981, the District Court ruled in Dr. William Clark Ford's favor on May 11, 1982. In the Court's conclusions of law it ruled that Dr. Ford should be reinstated *and granted tenure*. Since the question of tenure was not in issue at trial[3] and the court made no factual findings as to the appropriateness of tenure, MTSU sought clarification

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[2] Dr. Lani Ford, William C. Ford's wife, also brought an action against MTSU in the same suit alleging employment discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The District Court found that MTSU's failure to re-employ Dr. Lani Ford after one annual contract was the result of sex discrimination in violation of Title VII and ordered her reinstated as a faculty member with salary, benefit, seniority, and tenure. The Sixth Circuit Court of Appeals remanded Lani Ford's case because the District Court had impermissibly shifted the burden of persuasion from Lani Ford to MTSU.

[3] The Pre-Trial Order filed January 16, 1981 stated in relevant part:

"5. ISSUES SUBMITTED BY THE PLAINTIFFS

(c) Whether the plaintiff, Dr. William C. Ford, was terminated as a professor in May, 1974, and not re-employed thereafter as an associate professor at MTSU because he opposed the unlawful hiring policies of MTSU as regards female instructors, faculty members, or other employees, or as a reprisal or in retaliation for his having filed charges of employment discrimination with the Equal Employment Opportunity Commission in 1973.

(d) Whether the plaintiffs are entitled to reinstatement to the positions which they would have held but for the discriminatory practices of the defendants and the monetary relief to compensate them for the infringement of their statutory and constitutional rights.

of the Order. By order of April 25, 1983, the District Court reaffirmed its ruling as to tenure. It again made no factual findings, but nevertheless the court stated that the defendants had not met their burden of proof.

On appeal of the district court's decision to the Sixth Circuit, the defendants-appellants argued, *inter alia,* that the district court had abused its discretion in reinstating Dr. Ford and in awarding tenure. The Sixth Circuit rejected these arguments and affirmed the district court's holding for Dr. Ford *in toto.*

REASONS FOR GRANTING WRIT

I.

The District Court Allocated The Initial Burden Of Proof Regarding Tenure To The Defendant In Direct Contradiction To Title VII Principles Established By This Court.

In a retaliation case such as this one, the plaintiff must first establish a *prima facie* case of retaliation by showing:

(1) That he engaged in an activity protected by Title VII;

(2) That an adverse employment action occurred; and

(3) That there was a causal connection between the participation in the protected activity and the adverse employment decision.

McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983). *See also McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *DeAnda v. St. Joseph Hospital,* 671 F.2d 850 (5th Cir. 1982). The Court's finding of retaliation by MTSU in it's issuance of a terminal contract for Dr. Ford's fourth probationary year is not contested here.

The respondent did not, however, establish even a *prima facie* case of retaliation in regard to the award of tenure. He did meet the first requirement by showing that he engaged in a protected

activity. However, the trial record is completely devoid of proof by the respondent that *any* decision regarding tenure occurred, let alone an adverse one.[4] The respondent did not allege in his complaint that he was denied tenure because of MTSU's prohibited activity. Tenure was not mentioned in the list of issues delineated for trial in the Pre-Trial Order entered January 16, 1981. Only cursory mention was made of tenure at trial and that by the defendants. There was absolutely no proof at trial of a causal connection between the respondent's protected activity and any decision regarding tenure status.

Only after a *prima facie* case by the plaintiff has been established does the burden of producing some non-discriminatory reason for the action fall upon the defendant. *McMillan, supra, DeAnda, supra.* The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978).

In spite of this well-settled allocation of the burden of proof, the District Court stated in its Order filed April 26, 1983 that

> [t]he award of tenure is appropriate in this case because the defendants have failed to present to this Court any evidence that the plaintiffs would not have received tenure . . . Placing the burden of proof on this issue [on the defendant] is reasonable because of the unique tenure system at issue and because defendants have access to proof establishing that the plaintiffs would not have been approved.

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[4] While there were tenure recommendation and procedure policies in effect at the time, they do not appear in the trial record since no proof regarding tenure was offered by the plaintiff/respondent.

The burden of proof regarding tenure as a remedy for Dr. Ford was not at issue in the Court of Appeals.

Imposition of the burden of proof on the defendants by the District Court is directly contrary to this Court's allocations in *McDonnell Douglas, supra; Burdine, supra;* and *Sweeney, supra.* In *U. S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) this Court found that when a lower court erroneously stated the burden of proof in a Title VII case it was not possible to ascertain whether the findings of fact of that court were influenced by a mistaken view of the law. This Court vacated the judgment and remanded the case.

II.

This Court Needs To Correct The Erroneous Failure To Apply The "But For" Test Required By 42 U.S.C. § 2000e-5(g) In The Remedial Grant Of Tenure To A Reinstated Probationary Faculty Member.

Section 706(g) of Title VII specifically limits the use of promotion as a remedy for employment discrimination. It provides:

> No order of the court shall require...promotion of an individual as an employee...if such individual was refused ...advancement...for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 2000e-3(a) of this title.

Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g).

This section requires that before the trial court awards retroactive promotion as a remedy, it make a finding that the employee would have been promoted but for the discriminatory actions of the employer. *Harbinson v. Goldschmidt,* 693 F.2d 115 (10th Cir. 1982); *DeKolld v. Bailar,* 568 F.2d 1162 (5th Cir. 1978); *Richerson v. Jones,* 551 F.2d 918 (3rd Cir. 1977); *Day v.*

Mathews, 530 F.2d 1083 (D.C. Cir. 1976). The District Court made no findings of fact on whether Dr. William Clark Ford would have been granted tenure but for MTSU's unlawful practices. However, in its Order filed May 11, 1982 it granted Dr. Ford reinstatement and tenure. Thus, the District Court failed to conform with the requirements of 42 U.S.C. § 2000e-5(g) and made no mention of the section.

The Court of Appeals, in reviewing the award of tenure, made an independent determination that tenure was "automatically" conferred and affirmed the District Court's holding.[5] This action of the Court of Appeals is directly contrary to the directives of this Court in *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

> Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made.

Id. at 1791, n. 22 *quoting* 5A J. Moore, and S. Lucas, *Moore's Federal Practice,* § 52.06[2] (1981). Thus, the Court of Appeals should not have resolved this factual issue but should have remanded for further proceedings.

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[5] The Court relied solely on *State ex rel. Chapdelaine v. Torrence,* 532 S.W.2d 542 (Tenn. 1975), *cert. denied* 425 U.S. 953 (1976). *Chapdelaine* is not determinative in this case, however, since it held that an annual contract issued *after* the probationary period operated as an award of tenure. Dr. Ford, on the other hand, was reinstated by the court to the fifth year of a five to seven year probationary period and thus no tenure-awarding contract renewal decision was made to invoke the holding of *State ex rel. Chapdelaine, supra.* The Tennessee Court's holding does not therefore dispose of the question of tenure as a question of law.

Only when the record permits only one resolution of the factual issue may an appeals court resolve the issue. *Swint, supra* at 1792; *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-332, 95 S.Ct. 472, 479-480, 42 L.Ed.2d 498 (1974). There is only cursory mention of tenure in the trial record in this case. One witness testified that the grant of tenure was discretionary and not automatic (TR. 264). Another testified that the probationary period could last up to seven years (TR. 376).

Clearly this record does not permit the Court of Appeals to conclude that tenure was "automatically" conferred. This case should be reversed and remanded to the trial court for further fact finding on the issue of whether tenure would have been granted but for the defendant's prohibited activity.

CONCLUSION

For the reasons set forth above, the petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Sixth Circuit Court of Appeals to determine the correctness of the allocation of burden of proof in this Title VII action and the consequences of failing to apply the "but for" test required by 42 U.S.C. § 2000e-5(g) in awarding retroactive promotion as a remedy to a Title VII violation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition has been mailed this 18th day of December, 1984, to the below-referenced counsel:

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APPENDIX

APPENDIX A

No. 83-5330

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

Dr. Lani Ford and
Dr. William C. Ford,
Plaintiffs-Appellees,

v.

Chancellor Roy S. Nicks, individually and in his official capacity as Chief Executive Officer, State of Tennessee Board of Regents; Governor Ray Blanton; C. C. Bond; Wayne Brown; Sam Ingram; Kenneth Ezell; Edward S. Porter; Dale Glover; James H. Jones, Jr.; Charles J. Liner; Johnella H. Martin; Ella V. Ross; J. Frank Taylor; J. Howard Warf; David White; and Dwight Henry, individually and in their official capacities as members of the Board of Regents of the State of Tennessee; M. G. Scarlett, President, Middle Tennessee State University; and Middle Tennessee State University,
Defendants-Appellants.

On Appeal from the
United States District
Court for the Middle
District of Tennessee,
Nashville Division.

Decided and Filed August 23, 1984

Before: Jones and Contie, Circuit Judges; and Peck, Senior Circuit Judge.

Peck, Senior Circuit Judge. On April 26, 1977, Dr. Lani Ford and Dr. William C. Ford filed suit in federal district court against Middle Tennessee State University, the school's president, Dr. M. G. Scarlett, and the Board of Regents of the State University and Community College System of Tennessee and its members (collectively MTSU), contending that their terminations from the teaching staff at MTSU constituted employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Lani Ford alleged that her dismissal[1] after the 1971-1972 school year was due to sex discrimination as prohibited by 42 U.S.C. § 2000e-2 & -3. William C. Ford contended his dismissal at the end of the 1973-1974 school year was in retaliation for protesting against MTSU's employment practices and assisting his wife Lani in her battle for reinstatement after her termination, in violation of 42 U.S.C. § 2000e-3. After a two-day bench trial, on January 14 and 15, 1981, the district judge found MTSU had violated Title VII in both cases. He awarded Lani and William C. Ford back pay, reinstatement to their former positions at MTSU, and full tenure rights. MTSU appealed.

In April, 1970, William C. Ford, who was completing work on his doctorate in business education at Michigan State University, met with Dr. E. W. Midgett, chairman of MTSU's Department of Business Education and Office Management, to discuss his possible future employment as an instructor at MTSU. Midgett, who was aware that Lani Ford was also work-

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[1] Both terminations resulted from MTSU's refusal to review plaintiffs' contracts and are in context regarded as tantamount to dismissals.

ing on her doctorate in secondary education, had previously informed William C. Ford that the university had positions available for both William and Lani. At the meeting, William C. Ford entered into a contract with MTSU, establishing that he would be an associate professor for the 1970-1971 school year at a salary of $14,400. Midgett thereafter assured William C. Ford that he was attempting to locate a suitable position for Lani Ford, and that since four positions were available in the Sociology Department, his search most likely would be successful.

In June, 1970, the Fords moved to Murfreesboro, Tennessee, near the MTSU campus. Lani Ford had not as yet completed the requirements for her doctorate. She met with Dr. Ralph White, chairman of the Department of Education and Library Science, about a possible position in that department. He informed her that she could not become an instructor in the department since she had not completed her doctoral degree work. Later, in October, 1970, William C. Ford spoke with White again about Lani becoming a member of the department after she finished work on her terminal degree. White indicated that he did not favor the practice of hiring the spouses of faculty personnel employed by MTSU.

In December, 1970, after Lani Ford had completed all of the course requirements for her Ph.D., she contacted Dr. Delmar Pockat, dean at MTSU, about her future employment prospects. Pockat informed Lani Ford that if employed, her salary and status at the university would be restricted since she was the spouse of a presently employed faculty member. After subsequently meeting again with White, she was informed that a position as a "special teacher" was available, but that the position carried only a small salary and no faculty rank.[2] She rejected this offer.

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[2] The position apparently roughly equated that of administrative secretary.

Meanwhile, William C. Ford performed in a satisfactory manner during the 1970-1971 school year. In an annual review of his performance as an associated professor, Midgett declared that William C. Ford had made a valuable contribution to the university and its students. At the same time Midgett referred to the university's treatment of Lani Ford as discouraging and expressed his concern about the discriminatory treatment of husband and wife teams by the department. William C. Ford was reappointed to teach the 1971-1972 school year.

Both Lani and William C. Ford continued in their efforts to find employment for Lani. They wrote M. G. Scarlett, president of MTSU, informing him about the statements made by White, and concerning their frustrations in locating employment at MTSU for Lani Ford, despite earlier representations by Midgett. Scarlett did not respond to the letter.

After she received her degree, Lani Ford met with Scarlett in June, 1971. Scarlett informed her that he had recently become aware of certain Peabody funds available to hire her. He declared, however, that the funds were not permanent. On August 17, 1971, MTSU tendered to Lani Ford a contract of employment as an assistant professor in the Department of Education and Library Science for the 1971-1972 school year at a salary of $11,000. At the same time she accepted the position, Lani Ford held a Ph.D. in secondary education, and had three and one-half years of teaching experience in the field.

Lani Ford performed satisfactorily, according to evaluations by White, during her first semester at MTSU. In a variety of courses in education, she taught sophomores, juniors, and graduate students. During her second semester Lani Ford also satisfactorily performed, taking part in the university's student teacher program as well as teaching classes. In his evaluation of her work, however, White stated that he would be reluctant to hire someone with Lani Ford's qualifications except on a part-time basis. She was not rehired at the end of the 1971-1972

school year. At about the same time, John Trufant, who had held a regular faculty position, resigned from the Department of Education and Library Science. Lani Ford was qualified to teach many of the courses formerly taught by Trufant. Later, on August 8, 1972, John Wagner, who had taught freshman courses and student teachers also resigned. Lani Ford attempted to speak with Scarlett about each vacancy, but was unable to make telephone contact. She was later informed by Scarlett that each opening would be filled by one of the eight newly hired professors. This group consisted of seven men and one woman. Douglas H. Knox, who lacked a doctorate, was subsequently paid from the Peabody funds previously used to compensate Lani Ford. Knox taught primarily freshman courses. Knox, after completing the 1972-1973 school year, was reappointed.

In the Department of Business and Education, Midgett was replaced by H. Dalton Drennan as chairman in the summer of 1971. Shortly thereafter, William C. Ford submitted in writing certain suggestions for improving the department, including the hiring of a female faculty member. He was called into Drennan's office for an evaluation. Drennan together with Dean Firman Cunningham of the Economics Department informed Ford that certain student criticism had surfaced about his performance as a professor. He later responded to the charges in writing, declaring he would attempt to correct the problem. Nevertheless, in early 1972 Drennan told him that he, Ford, should begin looking for employment elsewhere.

In the fall of 1972, William C. Ford assisted his wife Lani in filing a complaint with the Equal Employment Opportunity Commission (EEOC) concerning her dismissal. In November, 1972, Ford was called to the office of Dean Cunningham, where he was grilled about the filing of certain "grievances" by MTSU faculty members. Cunningham told Ford that if he had any complaints about MTSU he should follow correct grievance procedures.

In the spring of 1973, Drennan, while recommending Ford be rehired for the 1973-1974 school year urged that he receive only the minimum wage increase possible. Ford thereafter received only a $120 increase, one of the lowest in the department, and he appealed this decision to Alex Simon, Cunningham's successor. Simon refused to reverse the decision. Several days later Ford was informed that he would not be rehired at the end of the 1973-1974 school year. Upon receiving this news, Ford filed a complaint with EEOC.

After his dismissal from MTSU, Ford attempted to secure unemployment benefits from the state of Tennessee. Though MTSU had failed to give him any explanation for his termination, the university contested his claim. Ford, however, ultimately prevailed and received benefits. At the same time, he filed a number of applications at other educational institutions in an effort to locate employment without success. In October, 1974, Ford successfully passed the state real estate licensing examination and began work at a small local real estate company. He thereafter formed his own moderately successful real estate partnership.

Lani Ford, after her dismissal, attempted to locate comparable employment at a number of other educational institutions.[3] When her job search was unsuccessful, she joined her husband as a partner in the real estate business. In 1980 she secured employment with the Tennessee Energy Authority.

In presenting their case at trial, the Fords introduced population statistics showing that despite the fact that females outnumbered males in Murfreesboro, Tennessee, MTSU had but six female instructors in its entire education department, as compared with thirty-four or thirty-five male instructors. This evidence, they argued, bolstered their position that Lani Ford's dismissal was due to sex discrimination.

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[3] Lani Ford had become pregnant during the 1972-1973 school year, but immediately began seeking employment thereafter.

In its defense at trial, MTSU argued that it had dismissed Lani Ford because she lacked the requisite requirements necessary for the university's Department of Education and Library Science. Since her terminal degree was in secondary education, MTSU contended, a field that was becoming less popular with students, her services were not needed at the time of her dismissal. MTSU also alleged that insufficient funds were available to keep Lani Ford as a member of the faculty.

At the close of all the evidence the district judge in a memorandum opinion dated May 11, 1982, recorded thorough and concise findings of fact and conclusions of law. He determined that Lani Ford had presented a prima facie showing of discrimination in violation of Title VII. Turning to MTSU's burden of proof the district judge declared that:

> Although an employer is not required to prove the absence of a discriminatory motive, the employer is required to establish non-discriminatory reasons by a preponderance of the evidence. *Whiting v. Jackson State University,* 606 F.2d 116 (5th Cir. 1980). Legally sufficient evidence is needed before the prima facie case of Dr. Lani Ford can be rebutted. *Berdine [sic] v. Texas Department of Community Affairs,* 608 F.2d 563, 567 (E.D.La. 1980) [sic]. Applying these tests to the reasons advanced by Dr. White on behalf of the defendants, the Court concludes that MTSU's failure to re-employ Dr. Lani Ford at the end of the 1972-73 scjpp; uear [sic] was the result of sex discrimination practiced against her in violation of 42 U.S.C. § 2000e-2.

The district judge also determined that William C. Ford had proven a violation of Title VII by a preponderance of the evidence in the record. The district judge, having found a violation in both the case of Lani and William C. Ford, ordered the Fords reinstated.

In determining back pay the district judge ordered MTSU to calculate the salary the Fords would have received from MTSU,

with appropriate salary increases. From this amount, Lani Ford subtracted the salary she would not have received during her pregnancy, amounts earned as a partner with her husband in their real estate business, and her salary earned while working for the Tennessee Energy Authority. William C. Ford subtracted the amounts received from his real estate activities. In a memorandum opinion dated April 26, 1983, the district court, based on the evidence before it, awarded Lani $136,342.36 and William C. Ford $86,432.76. At the same he awarded both tenure.

On appeal MTSU initially argues that the district judge committed reversible error by shifting the burden of persuasion contrary to the dictates of *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981). By requiring MTSU to prove by a preponderance of the evidence legitimate non-discriminatory reasons for terminating Lani Ford, it contends, the district judge impermissibly shifted the burden of persuasion from Lani Ford to MTSU. We agree.

In *Burdine,* the Supreme Court described the appropriate allocation of the burdens of proof in a Title VII lawsuit. *Id.* at 253, citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). The Court declared that a plaintiff is initially required to establish a prima facie case of discrimination. If successful, the Court continued, the burden of production shifts to the employer to articulate legitimate nondiscriminatory reasons for the dismissal. Such a showing is satisfied, the Court explained, when an employer presents "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Burdine,* 450 U.S. at 257. The Court held that where the Fifth Circuit had required an employer to show by a preponderance of the evidence such legitimate nondiscriminatory reasons for termination, it had impermissibly shifted the burden of persuasion to the employer.

In the case at bar, the district judge committed just this error in determining that Lani Ford had been the victim of sex discrimination. After finding that Ford had made out a prima facie case of discrimination, the district judge, applying the Fifth Circuit rule, disapproved by the Supreme Court in *Burdine,* carefully discredited in great detail each of MTSU's proffered justifications for dismissing Lani Ford. Determining that such justifications did not meet MTSU's requisite burden of proof, the district judge held that MTSU had committed a violation of Title VII. Since we conclude that this approach is identical to the approach of the Fifth Circuit, disapproved by the Supreme Court in *Burdine,* and since this error by the district judge directly leads to the ultimate finding of liability, we agree with MTSU that Lani Ford's case must be remanded to the district court for a new trial. *Burdine, supra; Brooks v. Ashtabula County Welfare Dept.,* 717 F.2d 263 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 1687 (1984).[4]

MTSU next contends that the district judge abused his discretion in his calculation of back pay award for William C. Ford, and by reinstating him to his former position. In particular, MTSU urges, the district judge failed to permit them to disprove amounts claimed by Ford, and did not correctly reduce the award by the amounts actually earned by Ford after his termination. Further, MTSU contends that because a long period of time has passed since Ford was terminated at MTSU, he no longer is qualified to teach at the institution. We disagree.

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[4] Relying on *Hazelwood School District v. United States,* 433 U.S. 299 (1977), MTSU contends that the district judge committed reversible error by considering general population statistics introduced by the Fords comparing the number of female instructors at MTSU with the number of females in Murfreesboro. Since, however, the Fords dropped their claim that a pattern of disparate treatment of women existed at MTSU, and since there was plainly other overwhelming evidence in the record to support the district judge's determination that MTSU had committed a violation of Title VII in terminating William C. Ford, we think that the submission of these statistics was harmless error. At the new trial, the court may be well advised to reconsider the admissibility of receiving evidence in this area.

It is well settled that a district court may award reinstatement and full back pay to the victim of employment discrimination in violation of Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 2151 (1984). In order to encourage the goals of Title VII, district courts are given broad latitude to fashion remedies that make a victim whole by restoring him, as nearly as possible, to the position he would have been in had the discrimination not occurred. *Albemarle, supra* at 422; *Rasimas, supra* at 626.

In the present case, the district judge ordered MTSU to submit salary schedules, including appropriate salary increases, applicable to William C. Ford from the time of his dismissal to the present. From this amount, ultimately supplied by MTSU, the court subtracted those amounts subsequently earned by Ford and made other appropriate adjustments. MTSU, though given the opportunity, presented nothing to disprove this amount. At the same time, despite Ford's statement that he still wished to return to MTSU and had no reservations about his capabilities to satisfactorily perform, MTSU presented nothing indicating that Ford was no longer able to satisfactorily perform as an instructor at MTSU. We hold, therefore, that the district judge did not abuse his discretion in calculating back pay for Ford and reinstating him to his rightful position at MTSU. *Rasimas, supra* at 626-27.[5]

The final issue raised by MTSU is whether the district judge properly awarded William C. Ford tenure at MTSU as part of his remedial order. MTSU contends that since William C. Ford had not satisfactorily completed five years of employment at

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[5] MTSU argues alternatively that William C. Ford failed to mitigate damages by seeking comparable employment after his dismissal. Such an argument is simply not factually supportable. William C. Ford made attempts to locate faculty employment elsewhere without success. Such efforts were plainly sufficient to constitute reasonable efforts to mitigate damages. *Rasimas, supra.*

MTSU, the understood probationary period before tenure, as described to him at the time of his employment, and since MTSU officials did not have the opportunity to specifically evaluate Ford for tenure purposes, the grant of tenure was improper. Federal courts, MTSU continues, have uniformly refused to invade the tenure process where the university has not had the occasion to initially evaluate the applicant for tenure. *See Gurmankin v. Costanzo,* 626 F.2d 1115, 1125 (3d Cir. 1980), *cert. denied,* 450 U.S.923 (1981); *Powell v. Syracuse University,* 580 F.2d 1150, 1154 (2d Cir.), *cert. denied, 439 U.S. 984 (1978); Faro v. NYU,* 502 F.2d 1229, 1231 (2d Cir. 1974). *See also Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)(freedom in academic decision making produces important societal benefits, judiciary should be reluctant to intrude into the process). As a result, MTSU urges, Ford should not have been granted tenure.

While we recognize that federal courts have generally deferred to the decisions of college and university officials in whether to grant tenure, particularly where the educational institution has not as yet had the opportunity to initially evaluate the credentials and overall performance of a tenure applicant, we need not address the issue in this case. Tennessee law, existing at the time of this case, automatically granted tenure to any professor at a state university who successfully completed five years of employment at the university. *State ex rel. Chapdelaine v. Torrence,* 532 S.W.2d 542, 546 (Tenn. 1975), *cert. denied,* 425 U.S. 953 (1976) (interpreting Tenn. Code Ann. § 49-1421 (1961), repealed by Tenn. Code Ann. § 49-8-301 (1976)). We therefore conclude that the district judge did not abuse his discretion by awarding William C. Ford tenure, restoring him to the position he would have been in but for the illegal discrimination by MTSU. *Albemarle, supra; Rasimus, supra.*

For the above reasons we remand Lani Ford's case to the district court for retrial. We affirm the district court's judgment in the case of William C. Ford *in toto.*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

DOCKET NO. 77-3202

Dr. Lani Ford, et al

vs.

Chancellor Roy S. Nicks, et al

Order

(Filed April 26, 1983)

Pursuant to the Memorandum and Order issued by this Court on May 11, 1982 finding that the defendant, Chancellor Roy Nicks et al, illegally discriminated against the plaintiffs, Dr. Lani Ford and Dr. William Clark Ford, in violation of Title VII of the Civil Rights Act of 1964, §§703(a) and 704(a), 42 U.S.C. §2000e-2 and §2000e-3, IT IS HEREBY ORDERED that:

1. As soon as possible, the defendants shall reinstate the plaintiffs to their former positions as members of the MTSU Faculty in the Department of Youth Education and School Personnel Services and the Department of Business Education and Office Management. The defendants shall provide the plaintiffs with the full salary, benefits, seniority and tenure status that each plaintiff would have received but for the defendants' illegal discriminatory acts. The award of tenure is appropriate in this case because the defendants have failed to present to this Court any evidence that the plaintiffs would not have received tenure under TENN. CODE A. §49-3255. This case is unique because tenure in colleges such as MTSU was automatic at the relevant time periods. Although both parties agree that TENN. CODE ANN. §49-3255 requires "positive approval" from the Board, the defendants have shown this Court no reason why this ap-

proval would not have been given but for their discriminatory actions. Placing the burden of proof on this issue is reasonable because of the unique tenure system at issue and because defendants have access to proof establishing that the plaintiffs would not have been approved.

The Court further ORDERS that the defendants be permanently enjoined and restrained from any further retaliation against the plaintiffs in their new positions because they challenged the defendants' employment practices.

2. Until the defendants reinstate the plaintiffs, the defendants shall pay backpay including appropriate salary increases. Based on the evidence now before the Court, it appears that the defendant Dr. Lani Ford is entitled to backpay for the period through June 1982 in the amount of $136,342.36 and the plaintiff Dr. William Clark Ford is entitled to backpay for the period through June 1982 in the amount of $86,432.76. As previously stated by this Court in its Memorandum of May 11, 1982, instead of being entitled to pre-judgment interest, the plaintiffs' backpay award includes appropriate salary increases. However, the defendants shall make appropriate deductions from the backpay award for federal income taxes and FICA taxes and provide the plaintiffs an itemized statement of the deductions and calculations.

3. For the plaintiffs' attorneys, the Court awards attorneys' fees according to the standards set forth in *Louisville Black Police Officers v. City of Louisville,* 700 F.2d 268 (6th Cir. 1983); *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 1 (1980); *Johnson v. Georgia Highway Express, Inc.,* 448 F.2d 714 (5th Cir. 1979). The affidavits of Charles Hampton White establish that his normal fee is $100.00 per hour and that he has spent a total of 69.75 hours on this case. The Court finds Mr. White's fee reasonable and the time spent on this case not excessive. Accordingly, he is awarded attorney fees in the amount of $6,975.00, pursuant to §706(k), 42 U.S.C. §2000e-5(k). The

Court also awards Mr. White the amount of $8.12 for expenses, which were in the nature of attorney fees. The affidavits of William Prentice Cooper establishes that he has been paid $50.00 per hour as legal fees in similar civil rights litigation, *see e.g., Williams v. Hoffmeister,* 520 F. Supp. 521 (E.D. Tenn. 1981), he claims that he has spent a total of 57.0 hours on this case. This Court finds Mr. Cooper's legal fee of $50.00 per hour reasonable and the time spent on this case not excessive. Accordingly, the Court awards his attorney fees in the amount of $2,850.00 pursuant to §706(k), 42 U.S.C. §2000e-5(k).

The Court further further tax the costs for this action pursuant to 28 U.S.C. §1920 in the amount of $309.98 to the defendants.

This Court shall retain jurisdiction over this suit for the purposes of enabling the plaintiffs to enforce the terms of this ORDER and the *MEMORANDUM AND ORDER* of May 11, 1982 and for the punishment of violations of the terms of those ORDERS. Accordingly, the defendants' motion to modify are denied.

/s/ _____
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

CIVIL ACTION NO. 77-3202

Dr. Lani Ford, et al

vs.

Chancellor Roy S. Nicks, et al

Memorandum

(Filed May 11, 1982)

This is an action commenced April 26, 1977, by the plaintiff spouses, Dr. Lani Ford and Dr. William Clark Ford, former professors at Middle Tennessee State University [subsequently referred to as "MTSU"] to remedy alleged employment discrimination against them by the Board of Regents of the State University and Community College System of Tennessee, its individual members, its member institution, Middle Tennessee State University, and the President of MTSU, M.G. Scarlett, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2 and 3. Specifically, Dr. Lani Ford has alleged in the complaint that she has been denied reappointment as a professor on the faculty of MTSU at the end of the 1971-72 academic year because of her sex, in violation of the provisions of 42 U.S.C. §2000e-2 and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Dr. Clark Ford has alleged in the complaint that, in violation of the provisions of 42 U.S.C. §20002-3, he was notified in August, 1973, that he would not be reappointed to the MTSU faculty at the conclusion of the 1973-74 academic year because he had protested employment practices made unlawful by Title VII of the Civil Rights Act of 1964, and as a reprisal against him for the filing of a charge, testimony,

assistance, or participation in a proceeding or investigation under the Act. Both by their answer and by subsequent motions to dismiss or, in the alternative, for summary judgment, the defendants insist that legitimate, non-discriminatory reasons exist for the failure to reappoint either plaintiff to a position as a faculty member at MTSU; insist the defendants who are not named in the charges of the plaintiffs filed with the Equal Employment Opportunity Commission cannot be found liable in this action; assert that the doctrine of sovereign immunity bars any suit by Dr. Lani Ford against MTSU for a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and that Dr. Lani Ford's equal protection claim is barred by the applicable statute of limitations of the State of Tennessee. Prior to trial, the defendants moved for a bifurcated hearing as to the issue of liability. This case was tried by the Court, without a jury on January 14-15, 1981, and the Court, having considered the pleading, the exhibits, the testimony of witnesses, the statement of counsel and the entire record in this cause finds the facts and states the conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure as follows:

Findings of Fact

In March, 1970, William Clark Ford was completing the requirements for a Ph.D. degree in Business Education at Michigan State University in Lansing, Michigan. Ford's wife, Lani Ford, was also completing the requirements for a Ph.D. degree in Secondary Education at Michigan State although she would not be awarded her degree until the end of the 1970-71 school year. On March 13, 1970, Elwin W. Midgett, the Chairman of the Department of Business Education and Office Management at MTSU telephoned Ford and advised him that MTSU had heard that Ford and his wife were looking for positions at an institution where both could teach and that MTSU had openings available for both. Midgett told Clark Ford that

MTSU was especially interested in obtaining his services because the University wished to institute a program leading to the conferral of Master of Business Education degrees by the Department, and that a third professor in the Department holding a doctorate would be necessary due to certain accreditation requirements for the program.

Acting in response to Elwin W. Midgett's call, Clark Ford came to the MTSU campus on April 20, 1970, and discussed employment for himself, and employment for his wife upon completion of her doctorate with Midgett, Dr. Howard Kirksey, Vice President for Academic Affairs, and Dr. Delmer Pockat, Dean of the College of Economics. On April 20, 1970, Clark Ford executed a contract of employment with MTSU establishing that he would be an associate professor in the Department of Business Education for the 1970-71 academic year at a salary of $14,400. Thus, Ford became the third professor in the Department of Business Education required for the accreditation of the new Master's program contemplated by the University.

On May 20, 1970, E.W. Midgett, the Chairman of the Department of Business Education and Office Management at MTSU, wrote Clark Ford and advised him:

> "I have not given up as yet on finding a position for Lani. Best bet here is in sociology as they are trying to fill four positions. I talked to the Dean of the school a few minutes and sent her resume down to him. The Department head gives up his position in the middle of the summer and I think I know who will take his place . . ."

As of both 1970 and 1981, MTSU has had no clear policy against the employment of husbands and wives among the members of its faculty.

In the summer of 1970, Dr. William Clark Ford and Lani Ford moved to Murfreesboro, Tennessee. At that time Lani Ford had not completed the requirements for her doctorate. She

visited the MTSU campus and spoke to Dr. Ralph White, Chairman of the Department of Education and Library Science, concerning the possibility of obtaining a position in that department. White responded by stating that she could not be employed in Education and Library Science because she did not have her terminal degree.

In October, 1979, Dr. Clark Ford spoke with Dr. White concerning the possibility of Lani Ford's employment upon the award of a doctorate in Secondary Education from Michigan State. White advised Clark Ford that he did not wish to hire any wives or husbands of other faculty members. Dr. Clark Ford was in his first year as an associate professor in the Department of Business Education at the time of this conversation.

During the month of December, 1970, after she had completed all of the course requirements leading to the conferral of a Ph.D. degree in Secondary Education from Michigan State, Lani Ford contacted Dean Delmer Pockat regarding employment opportunities for her. Pockat told her that if she were employed, she would be restricted in rank and salary because her husband was already on the faculty. Lani Ford spoke again with Dr. White who told her that there was a job available as a special teacher but that job would not entail faculty rank, tenure or salary commensurate with that received by other faculty members possessing the same academic credentials. Plaintiff Lani Ford rejected this offer of employment.

After these conversations had transpired between Lani Ford, Dr. Ralph White and Dean Pickat during the month of December, E.W. Midgett, in accordance with the policy of MTSU to evaluate each member of its faculty, reviewed with Dr. Clark Ford his first year's performance. In a memorandum entitled "Review of New Staff Members — Dr. William Clark Ford," Midgett observed:

> "Dr. Ford is understandably concerned at the discrimination against man and wife teams as he thinks this is a

> hinderance to professional development. This concerns me also very greatly since this has been a way of life at this institution for many years and the institution would have been a much poorer one had we had such a policy in the past. I don't believe that this is a university wide policy but it is at the departmental level. For a dean to tell Dr. Ford that if his wife were to be employed at this institution that she might be restricted in rank, salary, and tenure is, of course, discouraging and may cause us to lose the services of Dr. Ford in the Business and Office Education Department . . ."

Midgett concluded his evaluation of Ford as follows:

> "Dr. Ford has already made a dinstinct contribution to this Department and we're expecting him to continue to do so . . . I recommend that every effort be made to retain his services, as it would be a distinct loss for us to lose him. Since his wife is so thoroughly prepared for college teaching, it it hoped that a satisfactory position can be found for her; unless, of course, the university itself has a stated policy against man and wife teams teaching in the same institution."

Ford performed in a satisfactory manner as an associate professor in the Department of Business Education in the 1970-71 academic year. MTSU reappointed him to the faculty for the 1971-72 year and awarded him a salary increase of $900 effective September 1, 1971.

Both plaintiffs persisted in their efforts to find employment for Dr. Lani Ford at MTSU. On March 5, 1971, Dr. Clark Ford set forth the efforts in a letter to M.G. Scarlett, President of MTSU, and described in the letter the restrictive statements made by members of the MTSU administration to the Fords regarding the circumstances and status of Lani Ford if she ever were to become a member of the faculty. President Scarlett did not respond to this letter. However, the plaintiffs did meet with

Scarlett to discuss employmen. on the faculty for Lani Ford who by that time had received her Ph.D. in the area of Secondary Education. Instead, during the summer of 1971, the plaintiffs met with Scarlett and discussed employment on the faculty for Lani Ford. After speaking with other officials in the MTSU administration concerning the resources available for employing Dr. Lani Ford, Scarlett became aware of the existence of monies from a Peabody grant which could be used to fund a position for her for one year. These funds, however, would not be available on a permanent basis. On August 17, 1971, MTSU tendered to Dr. Lani Ford a contract of employment as assistant professor in the Department of Education for the 1971-72 school year at a salary of $11,000. When Dr. Lani Ford accepted this position on September 1, 1971, she held a Ph.D. degree in Secondary Education and had three and one-half years of teaching experience as a teacher at secondary schools in Oregon, Michigan and Alaska.

During the 1971-72 school year, MTSU required students in the Department of Education and Library Science seeking certification as teachers to take a number of required courses. Dr. Lani Ford was qualified and competent to teach all of them. Dr. Ralph White, Chairman of the Department, discussed preferences which Dr. Lani Ford had for class assignments and subjects during the fall of 1971 and assigned her to teach "Psychological Learning and Development," "Evaluation and Guidance;" and a graduate level course entitled "Evaluation and Guidance." Dr. Lani Ford's classwork during the first semester of the 1971-72 year involved teaching sophomores, juniors and graduate students. Dr. White rated the work and has stated that it was satisfactory and well done. In the second semester, Dr. White assigned Dr. Lani Ford to supervise student teachers and, again, she performed these duties in a satisfactory manner. Nevertheless, in an evaluation of Dr. Lani Ford on January 26, 1972, White concluded that he would be "reluctant to acquire additional staff in her area of specialization on anything other than a part-time or temporary basis." Dr. Lani

Ford completed the 1971-72 school year but was not reappointed. Yet, prior to the end of the second semester of the 1971-72 school year, Dr. John Trufant resigned as a member of the faculty of the Department of Education and Library Science. Trufant had occupied a regular faculty teaching position and had taught both undergraduate and graduate courses, many of which Dr. Lani Ford was qualified to teach.

Meanwhile, in the Department of Business Education and Office Management, Elwin W. Midgett had been succeeded as departmental chairman by Dr. H. Dalton Drennan, one of the two Ph.D.'s in the Department other than Dr. Clark Ford. On September 15, 1971, Ford submitted written suggestions for the improvement of the Department to Drennan. Among these was a recommendation that a female instructor should be employed because, although a majority of the students in the Department were female, no females were instructors in the Department then.

Consistent with the policy of MTSU to evaluate its faculty, in December, 1971, Dr. William Clark Ford, having received two week's notice, was evaluated by Dr. H. Dalton Drennam and Dean Firman Cunningham of the College of Economics. During this review, although Cunningham advised Ford that students had criticized saracastic remarks made by Ford in class, he advised Ford that this represented no serious problem and that Ford should not be concerned about it. Nevertheless, by a memorandum to Cunningham on December 13, 1971, Ford responded to the criticism and satisfied Cunningham who did not testify. Contrary to the written evaluation of Dr. Clark Ford undertaken by Midgett in the prior year, Dr. Drennan failed to prepare any written summary of the interview and evaluation of Dr. Clark Ford in December, 1971. Nevertheless, in February, 1972, immediately before Ford departed for a professional colloquium among professors of business administration, Drennan advised him that Ford should consider finding an academic position elsewhere where he would be happier. Ford responded

that he was always interested in improving himself. Although Dr. Drennan testified that he did not believe Ford should be continued on the faculty because of "ineffectiveness," at no time during the 1971-72 year did he prepare any written appraisal or evaluation with respect to this alleged perception. To the contrary, Drennan and the Department of Business Education reappointed Clark Ford at the end of the 1972-73 school year. But Ford received an increase in salary of only $360, which was less than the amount of the increases which the University had bestowed upon the other members of the faculty in that Department.

In the summer of 1972, the plaintiffs endeavored to obtain a new teaching position for Dr. Lani Ford. In early August, 1972, before classes for the 1972-73 school year began, Dr. Lani Ford learned that a second professor, Dr. John Wagner, had resigned on August 8, 1972, as a professor in the Department of Education and Library Science. For several years prior to his resignation, Dr. Wagner had taught elementary courses in this department and had also supervised student teachers. Dr. Lani Ford attempted to contact Dr. White by telephone after she learned of Dr. Wagner's resignation but was unable to communicate with White because he would not talk with her or declined to return her phone calls. Instead, on August 11, 1972, Dr. Lani Ford forwarded a written request to President Scarlett requesting that she should be assigned to the position vacated by Wagner. In a telephone conversation with Scarlett shortly after her August 11, 1972, letter, Dr. Lani Ford was told by Scarlett that all of the open positions in the Department of Education and Library Science had been filled by eight new professors or instructors, seven of whom were male, and one of whom, Douglas Knox, did not hold a doctorate degree. On September 13, 1972, Scarlett informed Dr. Lani Ford in a letter that he could find "no reasonable basis for intervention on my part" to review Dr. White's decision not to recommend her to fill openings in the Department of Education and Library Science for the 1972-73 school year.

During the 1972-73 school year, Douglas H. Knox, the new assistant professor in the Department of Education and Library Science, taught four freshman courses during the first semester, and supervised student teachers during the second semester. Just as Dr. Lani Ford had been in the prior academic year, Knox was also compensated by a Peabody grant. Yet, MTSU reappointed Knox at the end of the 1972-73 year. Although Knox obtained an Ed.D. degree from the University of Southern Mississippi in May, 1973, his only teaching experience in the classroom had been as an instructor of geography for two years at Morehead State University in Morehead, Kentucky.

In his first year as a professor at MTSU, Dr. Clark Ford was a member of the curriculum committee for the Department of Business Education and Office Management. Yet, after Dr. Lani Ford became a member of the faculty, Clark Ford testified that he observed a change in attitude on the part of Dr. Dalton Drennan. Drennan changed Ford's committee assignments and excluded him from interviews with prospective members of the faculty. Dr. Ron Toulouse, another member of the faculty of the Department of Business Education, observed to Ford that it was unfair for Ford's wife to be employed as a member of the faculty of MTSU where Toulouse's family, due to its number of children, needed a second source of income more than Ford's would.

Having failed to obtain employment after the 1972-73 school year began, Dr. Lani Ford filed a charge of employment discrimination with the Equal Employment Opportunity Commission on October 24, 1972. On November 2, 1972, Dr. H. Dalton Drennan was called to Dean Firman Cunningham's office to read a letter concerning the charge of discrimination which Dr. Lani Ford had filed. On November 21, 1972, about three weeks after Drennan read the letter in Dean Cunningham's office certining the charges of sex discrimination, Drennan, without notice, called Dr. Clark Ford on the telephone and instructed him to come to the Chairman's office.

When Ford walked into Drennan's office, Dean Firman Cunningham appeared and stated to Ford that "we're here to evaluate you" or words to this effect. Cunningham then proceeded to grill Ford on the manner in which it was proper to handle faculty grievances. At this point, Ford had filed no grievance and knew of no grievance which he had against the University, except with respect to the failure to obtain employment for his wife. No written summary or notation was prepared by Cunningham or Drennan with respect to the substance of this meeting. Instead, on February 1 or February 2, 1973, Drennan prepared a memorandum to Dean Cunningham regarding Ford's performance. Nowhere in this evaluation report to Cunningham is any mention made of any specific complaints of co-members of the faculty or students about Ford's teaching ability or classroom effectiveness in particular. Drennan did mention friction between Ford and Dr. Ron Toulouse, but this apparently stemmed from the unhappiness of Toulouse that Ford and his wife were both working as members of the faculty during the 1971-72 school year. Although Drennan's memorandum to Cunningham is hardly laudatory, Drennan did not recommend Ford's dismissal although he did recommend "that if he is kept on the staff he be given no more than the minimum raise for 1973-74". Ford was reappointed for 1973-74 but his salary increse was limited to $120 effective August 1, 1973. Again, the increase was less than the amounts which MTSU had bestowed upon other members of the Department holding lower qualifications or credentials than he.

On August 15, 1973, Dr. H. Dalton Drennan notified Ford in writing that he would not be recommended for re-employment at the conclusion of the 1973-74 year. On August 20, 1973, acting Dean Dr. T. William Vaught confirmed Drennan's decision. After receiving this information, Ford contacted President Scarlett and requested that he review Drennan's decision, affirmed by Vaught, that he not be reappointed at the end of the 1973-74 academic year. Ford told Scarlett in this conversation that time was running out with respect to the exercise by Ford of

his right to file a charge with the Equal Employment Opportunity Commission. Accordingly, Ford requested Scarlett to look into the matter quickly. But Scarlett advised Ford to take up his status with the new dean of the College of Economics who was reporting for duty on January 1, 1974. Ford nevertheless filed his charge of employment discrimination with EEOC on November 26, 1973.

Dean Alex J. Simon assumed his duties in the College of Economics on January 1, 1974. In accordance with Scarlett's instructions, Clark Ford contacted Dean Simon to request that he review Drennan's recommendation that Ford not be reappointed at the end of the 1973-74 year. Simon told Ford that the first thing he had received when he reported for work in his new position was a copy of Clark Ford's charge of employment discrimination filed with EEOC. Simon further told Ford that he would be foolish to reverse the decision which Drennan had made to terminate Ford. The 1973-74 year ended in May, 1974. Although Scarlett had advised Ford not to take any action until he had reviewed Ford's status, Scarlett wrote Ford on May 21, 1974, and insisted that he vacate his office immediately. On May 22, 1974, Scarlett wrote Ford another letter and advised him that he had reviewed his status and was "affirming the notice sent you earlier informing you that you will not be retained as a member of the MTSU faculty beyond the 1973-74 academic year".

After the 1973-74 year ended, Dr. William Clark Ford contacted a number of educational institutions and endeavored to obtain faculty positions. He was unsuccessful in doing so. Subsequently, he applied for unemployment compensation with the Tennessee Department of Employment Security. Although MTSU had refused to give Ford any reason why he had not been reappointed to the faculty, it protested and challenged his entitlement to obtain the unemployment benefits. Despite the protest, and the challenge of the University, the State of Tennessee allowed unemployment benefits to Dr. Clark Ford in the

amount of $280. In October, 1974, Clark Ford successfully completed the examination for real estate brokers in the State of Tennessee and has been employed as a real estate agent or broker since that time, initially with Bill Carey Realty Company in Murfreesboro, Tennessee, and since 1977 in business for himself. Dr. Lani Ford was pregnant in the 1972-73 year but after the birth of her child sought employment at institutions of higher learning in Middle Tennessee without success. In 1974, she joined her husband in his real estate activities and is presently assisting him therein. had the plaintiffs continued to serve as members of the faculty of MTSU, with the exception of one academic year, they would have received salary increases annually because of automatic increases in schedules establishing the salaries of academic personnel mandated by the Tennessee General Assembly and the Board of Regents of the Tennessee University and Community College System.

During the period from the academic year 1971-72 through the year 1976-77, Dr. Lani Ford was the only professor employed at MTSU who has not been reappointed at the end of her first year of teaching. In the 1971-72 year, although there were approximately 34 or 35 male faculty members of the Department of Education, there were approximately 6 or 7 female members of the Department. The 1970 census of the United States shows that in the City of Murfreesboro there were 14,048 females and 12,320 males. The total population of Rutherford County as of the 1970 census shows 30,164 females and 29,264 males.

Conclusions of Law

Since all actions taken by the defendants in terminating Dr. William Clark Ford's employment and in failing to re-employ Dr. Lani Ford were those of agents and officers of the Board of Regents of the State University and Community College System of Tennessee and its member institution, Middle Tennessee State University, and were the actions of an employer engaged

in an industry affecting commerce having 15 or more employees for each working day in twenty or more calendar weeks of a year, this Court has jurisdiction of this action pursuant to 42 U.S.C. §2000e(f)(1) and (3). Furthermore, since the actions of agents and officers of the Board of Regents of the State University and Community College System and its member institution, Middle Tennessee State University, are necessarily state actions, and as Dr. Lani Ford's salary exceeded $10,000, exclusive of interest and costs, 28 U.S.C. §1331 also confers jurisdiction upon the Court to entertain Dr. Lani Ford's claim under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Although the defendants have raised an issue with respect to the Court's jurisdiction to entertain Dr. Lani Ford's equal protection claim and have asserted the doctrine of sovereign immunity as well as the statute of limitations in bar to her claim for relief, it is unnecessary for the Court to resolve the issue because it is clear the jurisdiction exists under 42 U.S.C. §2000e-5(f)(1) and (3) to redress the employment discrimination practiced against her as well as her husband. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

Except for MTSU, the defendants have asserted that, because most of them were not named in the charges of discrimination filed by the plaintiffs with the Equal Employment Opportunity Commission, the unnamed defendants cannot be found liable here due to an alleged lack of subject matter jurisdiction over them. Yet, because there is an interrelation of operations, common management, centralized control of labor relations and common financial control between Middle Tennessee State University and the Board of Regents, a substantial identity exists between MTSU and the other defendants for the purposes of Title VII of the Civil Rights Act of 1964. *Chastang v. Flynn & Emrich Co.,* 365 F. Supp. 957 (D. Md. 1973)(unnamed trust committee may be joined where majority of members were directors of named company); *Williams v. Sheet Metal Workers Union,* 59 F.R.D. 49 (E.D. Pa. 1973)(unnamed joint appren-

ticeship committee can be joined where it was the mere *alter ego* of named union and contractor's association); *McDonald v. American Federation of Musicians,* 308 F. Supp. 664 (N.D. Ill. 1970)(unnamed officer of named local union). Any reasonable investigation and conciliation attempt conducted by EEOC with respect to the involved charges would have involved the named defendants. Furthermore, the statutory framework of Chapter 32 of Title 49, Tennessee Code Annotated, has established a relationship between the University, on the one hand, and the Board of Regents and its members, on the other, whereby the former can act as agent to implement any purpose of invidious discrimination of the latter. *Mickel v. South Carolina State Employment Service,* 377 F.2d 329, 241 (4th Cir. 1967), *cert. denied,* 398 U.S. 877 (1967). Under these circumstances, which exist in this case, it is manifestly unjust for the Board of Regents and its members, not named in the EEOC charges of the plaintiffs, to be dismissed.

For Dr. Lani Ford to prevail in her allegation that she has been denied employment at MTSU because of sex, it is settled law that she must establish: (1) that she is a woman; (2) that MTSU had an employment vacancy which it ought to fill; (3) that she possessed the qualifications necessary to fill the vacancy and applied; (4) that she was rejected; (5) that MTSU hired a male who was less qualified than she. By a preponderance of the evidence, it is clear that Dr. Lani Ford has established all five of these elements and has made a prima facie case requiring the defendants to come forward with a "legitimate, non-discriminatory reason for [her] rejection". *McDonald Douglas Corp. v. Green,* 411 U.S. 792, 803, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 688 (1972); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed. 2d 957 (1978); *Sherkow v. State of Wisconsin,* 630 F.2d 498 (7th Ed. 2d 957 (1980); *Campbell v. Ramsay,* 631 F.2d 597 (8th Cir. 1980); *Fisher v. Dillard University,* 499 F. Supp. 525, 531 (E.D. La. 1980).

MTSU in essence has advanced two reasons to explain its failure to re-employ Dr. Lani Ford at the end of the 1971-72

school year: (a) lack of funds; and (b) Ford's lack of qualifications commensurate with the goals or objectives of the Department of Education.

Douglas H. Knox, one of the seven new male faculty members hired by the University for the 1972-73 academic year, was paid from the same outside grant which had funded Dr. Lani Ford's employment in the prior year. The evidence therefore shows that funding continued to be available to pay the salary of a male whom the University had hired instead of Lani Ford and continued to employ for several years as a member of the faculty. Contrary to the assertions made by Scarlett, White and Pockat on behalf of the University, there is no proper or legitimate reason for the failure of the University to reappoint Dr. Lani Ford which can be grounded upon any consideration of funds or finances.

The next reason advanced by the University involving an alleged lack of qualifications by Lani Ford is more subjective. MTSU appointed Dr. Lani Ford to the faculty after she had received a Ph.D degree and had concentrated in the secondary school education of students. She had served three and one-half years as a classroom teacher at public schools in Oregon, Michigan and Alaska. The Department of Education and Library Science requires its students who seek teacher certification to study a required number of courses in the Department, all of which Dr. Lani Ford was qualified to teach. Students in the Department must undergo actual training in front of students in the classroom, and Ford was also competent and qualifed to supervise this aspect of the program of educating teachers. On the other hand, Douglas H. Knox, whom MTSU had hired eleven days after Dr. Lani Ford requested appointment to the vacancy created by the resignation of Dr. John Wagner, did not hold a terminal degree and did not possess teaching experience which prior to his appointment was superior to that of Dr. Lani Ford. Additionally, Douglas Knox's assignment during the first semester of the 1972-73 year was to teach

freshman courses exclusively whereas Ford, during her first semester, had, according to Dr. White, taught sophomore, junior and graduate courses in a satisfactory manner. Seeing that an objective of the Education Department is to train students for the teaching profession, it would appear that experience as a teacher in a secondary school classroom certainly is more noteworthy than the teaching experience which Knox enjoyed prior to his appointment, involving two years of experience as an instructor of geography at the college level. Next, although Dr. White has insisted that he was forced "to absorb" Dr. Lani Ford as a member of the faculty of the Department of Education, both Dean Pockat and President Scarlett have contradicted his testimony with respect to the alleged duress or compulsion with which Dr. Lani Ford was employed by the Department of Education. Both Pockat and Scarlett have aseerted that, at MTSU during the period of time pertinent to this lawsuit, the Chairman of each Department of the University possessed the freedom and authority in a Department to hire or fire new academic personnel. Although Dr. White has asserted that he needed a faculty with advanced training in reading, media communications, aerospace, special education and administration and supervision; he assigned Knox to teach required freshman courses during Knox's first semester and to supervise student teachers during his second. In any event, White's insistence that he was forced "to absorb" Dr. Lani Ford is not buttressed by the advanced classroom assignments which he gave her if indeed he did believe that she was unqualified, unspecialized or unable to accomodate the particular needs of the Department. Moreover, the admission by Dr. White that Dr. Lani Ford taught all of the courses assigned to her in a satisfactory manner contradicts any assertion that she may have been unqualified for a teaching load. At the same time, the number of new academic personnel hired by the Department of Education to handle the duties and teaching loads required of the Department during the decade of the 1970's shows that there is no basis upon which to assume that no

job was offered to Dr. Lani Ford simply because, due to allegedly declining enrollments, no students would have been available in the 1972-73 academic year. Finally, the failure to offer Dr. Lani Ford the position which Dr. John Wagner had resigned in dictates the pretextual nature of White's reasons for not employing Ford. Wagner taught a freshman course, and supervised student teachers, the same teaching assignment which White bestowed upon Knox immediately after his appointment.

Although an employer is not required to prove the absence of a discriminatory motive, the employer is required to establish non-discriminatory reasons by a preponderance of the evidence. *Whiting v. Jackson State University,* 606 F.2d 116 (5th cir. 1980). Legally sufficient evidence is needed before the prima facie case of Dr. Lani Ford can be rebutted. *Berdine v. Texas Department of Community Affairs,* 608 F.2d 563, 567 (E.D. La. 1980). Applying these tests to the reasons advanced by Dr. White on behalf of the defendants, the Court concludes that MTSU's failure to re-employ Dr. Lani Ford at the end of the 1972-73 scjpp; year was the result of sex discrimination practiced against her in violation of 42 U.S.C. §2000e-2. But for sex discrimination, which is exemplified by the numerical disparity between males and females in the Department of Education and Library Science, there is a substantial basis to assume that Dr. Lani Ford would have continued in her employment by the University, and there is no basis to assume otherwise.

With respect to the allegation of Dr. William Clark Ford, a similar analysis must be undertaken. The reason advanced by Dr. H. Dalton Drennan on behalf of the University for Dr. Clark Ford's discharge has ineffectiveness. The weight of the evidence does not support that claim.

First, it is clear that Dr. Clark Ford during his first year of service at MTSU was a satisfactory professor. Elwin W. Midgett desired to retain him on the faculty even though Midgett was aware of Ford's unhappiness with the alleged

discriminatory practices which Ford had reported to Midgett. The timing of the events leading to the alleged unfavorable evaluation of Ford and his eventual discharge is revealing. In September, 1971, Ford advised Dr. Drennan, the new Department Chairman, that, among other things, the Department would improve the calibre of the educational experience being offered to students by hiring a female instructor because the majority of students in the Department were female. By this time, moreover, Dr. Lani Ford had gained employment on the faculty. Clark Ford testified he then began to observe a change in the regard by which Dr. Drennan held him as a member of the faculty of the Department of Business Education. Drennan changed Ford's committee assignments to those with little significance. Ford was not permitted to enjoy any extensive interview or contact with prospective members of the faculty. The Court infers that Dr. Drennan had determined to relegate Ford to a diminished status forcing his resignation.

Although Drennan has described Ford's teaching during the 1971-72 year as "ineffective", Drennan did not recommend to the University that it should not reappoint Ford to his position for the next academic year. If Ford's teaching indeed had been as ineffective, sarcastic and petty to the extent that Drennan's "notes" would suggest, Drennan would not have countenanced Ford's appointment to the faculty of MTSU at the end of the 1971-72 year. Instead, it appears that Ford was an effective professor. Midgett thought so in December, 1970, and no other written document exists of an official nature which challenges Midgett's evaluation until the memorandum written by Drennan in February, 1973.

No evidence has been introduced in this case with respect to the truth or validity of the details or episodes upon which Dr. Drennan has allegedly established his unfavorable evaluation of Clark Ford's job performance. Instead, the defendants have submitted details and episodes to the Court simply to demonstrate the reasonableness of Dr. Drennan's mental pro-

cesses in arriving at his conclusion about a fellow member of the faculty. The truth and validity of the details and episodes are not in issue here, but the extent to which Drennan investigated or communicated them to others must be. There is no written evaluation of Dr. Clark Ford offered to him by Drennan during the period of the latter's service as the Chairman of the Department. Although Ford and Drennan once took coffee breaks together as fellow members of the faculty, there is no evidence of oral communication from Drennan to Ford concerning the alleged deficiencies of the latter. Indeed, until the trial of this action more than seven years later, there is no explanation by the University to Clark Ford as to why he was terminated. Although the defendants have urged that the silence of the University and its officials has been lawful, it is difficult to believe that the academic leadership of MTSU would not have offered constructive criticism of Dr. Clark Ford before undertaking the drastic step of discharging him. This would seem to be especially true in light of Dr. Clark Ford's apparently valuable contributions to the Department of Business Education and Office Management in terms of development of a program leading to the conferral of Master of Business Education degrees. Accordingly, the Court concludes that impaired communications between Drennan and Ford with respect to the deficiencies alleged in the abilities of this plaintff have amounted to a lack of candor on the part of the University which must be a factor militating strongly in support of a finding of a pretext. *Fisher v. Dillard University*, 499 F.Supp. 525, 532, 533 (E.D. La. 1980).

It is clear that Dr. William Clark Ford was engaged in protected activity when he protested employment policies which are unlawful under Title VII of the Civil Rights Act of 1964 and that he was subsequently discharged from employment by MTSU. The sole issue is whether there is a causal connection between the protected activities and his subsequent termination. *Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980); *Bradington v. International Business Machines Corp.*, 360 F.

Supp. 845, 854 (D. Md. 1973), *aff'd without opinion*, 492 F.2d 1240 (4th Cir. 1974); *Tidwell v. American Oil Co.*, 332 F. Supp. 424 (D. Utah 1971); *Hochstadt v. Worchester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318, 324 (D. Mass. 1976). Not only did Dr. Drennan recommend that Clark Ford be dismissed at the end of the first year following the filing of a charge of employment discrimination by Lani Ford, he was clearly aware of the charge at the time of his evaluation with Dean Cunningham of Dr. Clark Ford in November, 1972, and when he notified Ford of the latter's non-reappointment in August, 1973. Dr. Drennan was discredited upon his demeanor as a witness and the inconsistent substance of his testimony. MTSU proferred no other reason or witness in support of its failure to retain this plaintiff as a professor in the Department of Business Education and Office Management. A preponderance of the evidence shows that the reasons advanced by the defendants for not continuing Ford's employment are pretextual. Rather, the determinative basis upon which the University terminated Clark Ford was that he had protested the employment policies of the University which sanctioned equal status for some pairs of faculty spouses but not for others; had written letters of protest to the President of the University; has assisted his wife in filing a charge of employment discrimination with the appropriate investigative agencies; and had urged the Department of Business Education and Office Management to employ one or more female instructors. MTSU challenged Ford's application for unemployment benefits in 1974 on a dubious ground, there is evidence after the date of Dr. Clark Ford's discharge that the University was engaged in a tactic of retaliation against him as a result of his assistance to his wife in filing the EEOC charge and his protest against the employment practices of the institution. The reason was to punish him for his efforts to obtain employment for his wife and other females and for failing to stop his wife from filing her charge of discrimination.

Having himself filed a charge of employment discrimination under the Act, Dr. Clark Ford is protected by its provisions.

> "If any element of . . . retaliation or reprisal played any part in a challenged action, no matter how remote or slight or tangetial, the court would hold that the challenged action was in violation of . . . the law . . ."
>
> *United States v. Hayes International Corp.*, 6 FEP Cases 1328, 1330 (N.D. Ala. 1973).

Since the retaliation is unlawful under 42 U.S.C. §2000e-3, the Court concludes that Dr. Clark Ford is entitled to relief. *Tidwell v. American Oil Co.*, 322 F. Supp. 424, 430 (D. Utah 1971).

The Court is mindful of the undesirability of overturning the judgment of professional educators with respect to the decisions made by them in hiring other professionals, *Cohen v. Community College of Philadelphia*, 484 F. Supp. 411 (E.D. Pa. 1980). However, Dr. Ralph White having himself judged the performance of Dr. Lani Ford as a member of the faculty of MTSU, testified on behalf of the University that she performed satisfactorily and without complaint during the 1971-72 academic year. Furthermore, the record reflects a number of administrative changes in the leadership of MTSU since the discharge of the plaintiffs. As a result, in following the path between excessive intervention in the affairs of the University and an unwarranted tolerance of unlawful behavior, the Court concludes that it would be appropriate for the Board of Regents of the State University and Community College System of Tennessee, acting to supervise the personnel affairs of MTSU as one of its member institutions, to reinstate each of the plaintiffs as a member of the MTSU faculty, with full salary and the appropriate, benefits, seniority and tenure status which MTSU would have afforded to them had each been continuously employed from the end of that academic year in which each respectively failed to be hired to the present in the Department of Youth Education and School Personnel Services and the

Department of Business Education and Office Management respectively. *Kunda v. Muhlenberg College*, 22 FEP 62, 73-76 (3rd Cir. 1980); *Schwartz v. Florida*, 23 FEP 203 (N.D. Fla. 1980); *Yeary v. Clarksville-Montgomery Bd. of Educ.*, 13 FEP 894 (M.D. Tenn. 1976). Such a remedy affords to the plaintiffs the employment opportunity which has been denied to them in violation of Title VII. At the same time, the justification for the opportunity rests upon the same framework by which White and Drennan have reached allegedly professional judgments to the effect that the plaintiffs should not be hired or reappointed. The University has had an ample opportunity at trial to present testimony as to any other factor on which a decision to deny tenure may be based but failed to do so. In any event, the fact that the discrimination in this case took place in an academic rather than a commercial setting does not permit the Court to abdicate its responsibility to insure the award of a meaningful remedy. To the contrary, the Court must not shrink from discharging the responsibilities entrusted to it pursuant to Title VII by Congress.

The plaintiffs are entitled to backpay to compensate them for wages lost as a result of the discriminatory conduct involved in this case. 42 U.S.C. §2000e-5(g); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 262 (5th Cir. 1974). Absent discrimination, both plaintiffs would have earned substantially more as professors at MTSU than they have in real estate. Pursuant to 42 U.S.C. §2000e-5(g), the backpay otherwise allowable is to be reduced by "[i]nterim earnings or amounts earnable with reasonable diligence" by the plaintiffs. Although the record contains evidence of the amounts which have been earned by each plaintiff from 1980 to the beginning of the first academic year at MTSU in which each, respectively, failed to be appointed to employment at that institution, the defendants have failed to carry the burden of going forward with evidence demonstrating that either plaintiff has failed to exercise the reasonable diligence from which a determination might have been made that other or further funds were earnable. *Sprogis v.*

United Air Lines, Inc., 517 F.2d 387, 392 (7th Cir. 1975). Instead, the testimony of each plaintiff has established that they have endeavored, when permitted by family circumstances to do so, to obtain employment in various institutions of higher learning.

Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k) provides that "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . ." Much of the law governing fee awards under Section 706(k) is settled. Thus, an individual prevailing as a plaintiff in an employment discrimination suit "ordinarily is to be awarded attorney's fees in all but special circumstances." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415, 95 S.Ct. 2636, 45 L.Ed.2d 280 (1975); *Copeland v. Martinez*, 603 F.2d 981, 985 (D.C. Cir. 1979). Both plaintiffs have prevailed in this action, and there are no special circumstances present here which would preclude them from an award of attorney's fees, to be taxed as part of the costs of this proceeding. Finally, the defendants, the Board of Regents and its member institution, Middle Tennessee State University, are not immune from an award of attorney's fees under 42 U.S.C. §2000e-5(k) as a result of any ground relating to the Eleventh Amendment to the Constitution of the United States. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457, 96 S.Ct. 2666, 49 L.Ed.2d 614, 622 (1976). Accordingly, the Court concludes that a reasonable attorney's fee will be included within the costs of this action and will be assessed against the Board of Regents of the Tennessee University and Community College System.

The Board of Regents of the State University and Community College System of Tennessee, acting to supervise the personnel affairs of its member institution, Middle Tennessee State University, shall immediately and forthwith appoint (1) Dr. Lani Ford as a member of the faculty of the Department of Youth Education and School Personnel Services at the Universi-

ty, and (2) Dr. Clark Ford as a member of the faculty of the Department of Business Education and Office Management at the University; both appointments to be made by the Board of Regents with full salary and the appropriate benefits, seniority and tenure status which MTSU would have afforded to them had each been continuously employed upon the faculty from the end of that academic year in which each respectively failed to be hired to the present.

The Board of Regents of the State University and Community College System of Tennessee and its member institution, Middle Tennessee State University, shall pay (1) backpay to Dr. Lani Ford and (2) backpay to Dr. Clark Ford; both payments to be computed from the date of the entry of judgment to the date of the beginning of the first academic year of Middle Tennessee State University in which each of the plaintiffs respectively failed to be hired, after deduction of the wages, salaries and real estate commissions which have been earned by the plaintiffs throughout such period of time. Instead of being entitled to any award of pre-judgment interest, each plaintiff with respect to his or her award of backpay shall benefit by being paid each automatic increase in salary, together with increase on increase, which has been set forth in the applicable schedules mandated by the Tennessee General Assembly and the Board of Regents during the foregoing time period.

Pursuant to Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k), the plaintiffs are granted an award of attorney's fees, to be taxed as part of the costs of this proceeding. All costs are taxed against the Board of Regents of the State University and Community College System.

In light of the foregoing, it is ORDERED that the Clerk shall enter judgment pursuant to Rules 58 and 79. It is further ORDERED that the attorneys for the defendants within seven days prepare and submit to the Court a computation setting forth the amounts due each plaintiff in backpay pursuant to the

conclusions reached in this case with respect to the plaintiff's monetary relief; and that the attorneys for the plaintiffs within seven days prepare and submit to the Court a schedule of fees for the preparation and prosecution of this case, which the Court will use to evaluate a reasonable attorney's fee in light of the standards enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

An appropriate ORDER will be entered simultaneously with this Memorandum.

This the 11th day of May, 1982.

/s/_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

CIVIL ACTION NO. 77-3202

Dr. Lani Ford, et al

vs.

Chancellor Roy S. Nicks, et al

Order

(Filed May 11, 1982)

In accordance with the reasoning set forth in the Memorandum filed contemporaneously, it is ORDERED that the plaintiffs have a judgment pursuant to Rules 58 and 79 of the Federal Rules of Civil Procedure. It is further ORDERED that the attorneys for the defendants have seven (7) days in which to prepare and submit to the Court a computation setting forth the amounts due and owing to each plaintiff in backpay and further, the attorneys for the plaintiff shall submit to the Court within seven (7) days a schedule of fees for the preparation and prosecution of this case, which the Court will use to evaluate a reasonable attorney's fee in light of the standards enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Entered this 11th day of May, 1982.

/s/_____
United States District Judge

Office-Supreme Court, U.S.
FILED
JAN 19 1985
ALEXANDER L. STEVAS,
CLERK

84-1096

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHANCELLOR ROY S. NICKS, *et al.*,
Petitioners,

vs.

DR. WILLIAM CLARK FORD,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that an award of tenure to the Respondent pursuant to a unique Tennessee statute was proper to make Respondent whole for the discrimination which the district court and the Court of Appeals found had been practiced against him.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, Dr. William Clark Ford, opposes the petition for writ of certiorari in this case because the United States Court of Appeals for the Sixth Circuit correctly determined the question presented and there is no compelling reason why its decision should be reviewed by this Court.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 741 F.2d 858 (6th Cir. 1984) and is included as APPENDIX A in the Petition for Certiorari. The Memorandum Opinion and Order of the United States District Court for the Middle District of Tennessee, affirmed by the Court of Appeals, issued May 11, 1982, is reproduced as APPENDIX C to the petition for certiorari and is unreported as is the Order of the district court issued April 6, 1983, which is included as APPENDIX B to the petition for certiorari.

STATUTORY PROVISION INVOLVED

42 U.S.C. §2000e-5(g)

STATEMENT OF THE CASE

Dr. William Clark Ford, the Respondent, was first employed by Middle Tennessee State University at Murfreesboro, Tennessee, as a professor in the Department of Business Education for the 1970-71 academic year. Ford taught at MTSU a total of four years. At the time of his appointment, the law of Tennessee automatically granted tenure to a professor at a state university who successfully completed five years of employment. In August, 1973, Ford was given a final one-year contract. Ford had opposed unlawful employment practices at MTSU. He also assisted his wife in filing a charge of sex discrimination against the university. Ford filed suit in the United States District Court for the Middle District of Tennessee alleging that he had been terminated because of his opposition to unlawful employment practices of the university pursuant to 42 U.S.C. § 2000e-3.

The district court found that MTSU had intentionally discriminated against Ford and on May 11, 1982, ordered Ford reinstated at MTSU with full backpay and tenure status. On April 25, 1983, the district court reaffirmed its reinstatement of Ford with tenure.

Although the Petitioners appealed to the United States Court of Appeals for the Sixth Circuit, they did not challenge the district court's finding that Ford was the victim of retaliation in violation of the Act; instead, they argued only that the district court erred in awarding Ford tenure. The Court of Appeals in its August 23, 1984, decision rejected the argument of the Petitioners and on September 20, 1984, denied a petition for rehearing.

ARGUMENT

The Court Of Appeals And The District Court Properly Intrpreted This Court's Decisions In Making Respondent Whole Because Of The Discrimination And Retaliation Practiced Against Him.

Ford was employed at Middle Tennessee State University in 1970 at a time when Tennessee law automatically granted tenure to any professor at the state university who successfully completed five years of employment at the institution. *State ex rel. Chapdelaine v. Torrence,* 532 S.W.2d 542, 546 (Tenn. 1975), *cert. denied* 425 U.S. 953 (1976). Although the tenure requirements for state universities in Tennessee were subsequently changed, the five-year requirement was the law as of the time of Ford's employment as well as his last year of service, 1973-74, §49-1421, Tennessee Code Annotated, which was repealed by §49-8-301, Tennessee Code Annotated, in 1976. Thus the statutory provisions under which Ford was employed are now history and have no application in pending or future litigation involving faculties of state universities in Tennessee.

In the district court MTSU offered no evidence which would suggest Ford would not have been continued as a professor but for the retaliation practiced against him because of his wife's filing of a sex discrimination charge against the institution and Ford's protest over the sexually discriminatory policies of MTSU. Thus, the district court correctly concluded that, but for MTSU's unlawful discrimination against Ford, he would have continued as a member of the MTSU faculty [Pet. App. 36]. Even though MTSU offered no evidence to the district court to support its insistence that Ford should not have been awarded tenure, they argue in this Court that the district court erred in allocating the burden of proof with respect to the remedy the district court fashioned to correct the discrimination against Ford. Respondent submits the Petitioners have confused the requirements for proving liability with the standards this Court has announced for making victims of discrimination whole.

The Petitioners, in their first reason for urging their Petition for Certiorari be granted, state that "The Respondent did not, however, establish even a *prima facie* case of retaliation in regard to the award of tenure." [Pet. p. 4]. Petitioners, however, cite no authority for the proposition that before a victim of discrimination or retaliation can obtain relief, he must establish a separate prima facie case with regard to the remedy. As the decision of the district court reveals, tenure was found to be the only means of making Ford whole for the retaliation which the district court found had been practiced against him and about which the Petitioners do not complain. Furthermore, having heard all of the evidence, the district court decided the issue of discrimination and retaliation as directed by *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

Having correctly determined that Ford was the victim of unlawful discrimination and retaliation, the district court proceeded to fashion a remedy for Ford which would place him in the position he would have been but for the unlawful discrimination against him. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). In *Albemarle Paper,* this Court, after reviewing the legislative history of Title VII stated:

> "The [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future . . . and where a legal injury is of an economic character, '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the same situation he would have occupied if the wrong had not been committed.' *Wicker v. Hoppock,* 6 Wall 94, 99, 18 L.Ed. 752 (1867)."
>
> 422 U.S. at 418, 419

Certainly, the district court followed this Court's teaching in *Albemarle*. It placed Ford in the same position he would have been had the wrong not been committed. Certainly, reinstatement with tenure for a faculty professor is as clearly a "make whole" remedy as an award of retroactive seniority for a truckdriver with this Court directed in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

The award of tenure in this case does not set any far-reaching precedent for judicial interference in tenure decisions generally. Unique provisions of Tennessee law, which have since been repealed, made tenure automatic for Respondent in the absence of the retaliatory discharge. As the district court noted, the Petitioners had "ample opportunity at trial to present testimony as to any other factor on which a decision to deny tenure may be based but failed to do so." [Pet. App. 36] Petitioners cannot now complain of an award of tenure to remedy their own wrongdoing. Neither the district court nor the Court of Appeals erred in directing William Clark Ford's reinstatement with tenure.

CONCLUSION

For the reasons assigned, the Respondent respectfully urges that the writ be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles Hampton White, do hereby certify that a true and correct copy of the foregoing Brief In Opposition To Petition For Writ Of Certiorari has been mailed this 18th day of January, 1985, to W. J. Michael Cody, William B. Hubbard, Richard S. Doughty, and Christine A. Modisher, Attorney General and Assistant Attorneys General, State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219.

CHARLES HAMPTON WHITE